85-544

No.

Supreme Court, U.S.
FILED
SEP 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

SUBURBAN FORD, INC., DON HANSARD, LINDA HANSARD, BEN YOUNG, MARGARET YOUNG,
Petitioners,

vs.

FORD MOTOR CREDIT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

EDWARD A. MCCONWELL
(*Counsel of Record*)
CLAYTON E. DICKEY
LAW FIRM OF
EDWARD A. MCCONWELL
Cloverleaf 5 Bldg., Suite 210
6701 West 64th Street
Overland Park, Kansas 66202
(913) 262-0605
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. DID THE SUPREME COURT OF KANSAS VIOLATE THE CONSTITUTIONAL RIGHTS OF SUBURBAN FORD, INC. AND THE SUBURBAN PRINCIPALS UNDER THE SEVENTH AND FOURTEENTH AMENDMENTS BY EXCEEDING ITS JURISDICTION WHEN IT INVADED THE PROVINCE OF THE JURY?

2. DOES THE FOURTEENTH AMENDMENT PERMIT THE KANSAS SUPREME COURT TO DISREGARD THE KANSAS CONSTITUTION, KANSAS STATUTES AND KANSAS CASE LAW?

TABLE OF CONTENTS

QUESTIONS PRESENTED I
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL & STATUTORY PROVISIONS 2
STATEMENT OF THE CASE 4
REASONS FOR GRANTING WRIT—
I. The Seventh Amendment to the Constitution of the United States Should Be Applied to the States in Actions Involving Contract and/or Tort 10
II. Once a State Has Established the Right to Trial by Jury, the Fourteenth Amendment Requires That It Be Afforded 14
III. The Fourteenth Amendment Requires the Kansas Supreme Court to Act Within Its Jurisdiction 16
CONCLUSION 21
APPENDIX—
Appendix A A1
Appendix B A25
Appendix C A26
Appendix D A27
Appendix E A28
Appendix F A30

TABLE OF AUTHORITIES

Cases

Apperson v. Security State Bank, 215 Kan. 724, 528 P.2d 1211 (Kan. 1974) 18

Atlantic & Gulf Stevedores v. Ellerman Lines Ltd., 369 U.S. 355, 7 L.Ed.2d 798, 82 S. Ct. 780 (1962) 16

Benton v. Maryland, 395 U.S. 784, 23 L.Ed.2d 707, 89 S. Ct. 2056 (1969) 11

Betts v. Brady, 316 U.S. 455, 86 L.Ed. 1595, 62 S. Ct. 1251 (1942) 10-11

Boulevard State Bank v. FMCC and Suburban Ford, Inc., Case No. 81c1249 6

Byrd v. Blue Ridge Rural Electric Co-Op, Inc., 356 U.S. 525, 2 L.Ed.2d 953, 78 S. Ct. 893 16

Carr v. Unit No. 8169, 237 Kan. 660, ... P.2d ..... (Kan. 1985) 18, 20

Coleman v. MacLennon, 78 Kan. 711, 98 P. 281 (Kan. 1908) 16

Colgrove v. Buttins, 413 U.S. 149, 37 L.Ed.2d 522, 93 S. Ct. 2448 (1973) 12

Cox v. Hutto, 619 F.2d 731 (8th Cir. 1980) 15

Duncan v. Louisiana, 391 U.S. 145, 20 L.Ed.2d 491, 88 S. Ct. 1444 (1968) 11

Ernest v. Faler, 237 Kan. 125, 697 P.2d 870 (Kan. 1985) 18

Fay v. People of State of New York, 322 U.S. 261 (1947) 12, 14

First National Bank of Olathe v. Clark, 226 Kan. 619, 602 P.2d 1299 (Kan. 1979) 14

Fisher v. Sears Roebuck & Co., 207 Kan. 493, 485 P.2d 1309 (Kan. 1971) 17

Ford v. Guarantee Abstract & Title Co., 220 Kan. 244 (Kan. 1976) 12
Gallick v. Baltimore and Ohio Railroad Company, 372 U.S. 108, 9 L.Ed.2d 618, 83 S. Ct. 659 (1963) 12
Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904) 18
Hass v. Preferred Risk, 214 Kan. 747, 522 P.2d 438 (Kan. 1974) 17
Hindman v. Shepard, 205 Kan. 207, 468 P.2d 103 (1970), *cert. denied*, 401 U.S. 928 (1971) 14
Isler v. Texas Oil & Gas Corp., 749 F.2d 22 (10th Cir. 1984) 19, 20
Jacob v. City of New York, 315 U.S. 752, 86 L.Ed. 1166, 62 S. Ct. 854 (1942) 11
Klimas v. Mabry, 599 F.2d 842 (8th Cir. 1979), *rev'd on other grounds*, 448 U.S. 444, 65 L.Ed.2d 897 (1980) 14-15, 16
Klingbiel v. Commercial Credit Corporation, 439 F.2d 1303 (10th Cir. 1976) 20
Knowles v. Klase, 204 Kan. 299, 460 P.2d 944 (Kan. 1969) 18
Manley v. Wichita Business College, 237 Kan. 427, ... P.2d ..... (Kan. 1985) 18
Palko v. Connecticut, 302 U.S. 319, 82 L.Ed. 288, 58 S. Ct. 149 (1937) 10, 11
Peek v. Kemp, 746 F.2d 672 (11th Cir. 1984) (rehearing *en banc*, 1985) 15
Pernell v. Southall Realty, 416 U.S. 363, 40 L.Ed.2d 198, 94 S. Ct. 1723 (1974) 12
Reichuber v. Cook Well Servicing, 220 Kan. 93, 551 P.2d 810 (Kan. 1976) 20
Shore v. Parklane Hosiery Company, Inc., 565 F.2d 815 (2nd Cir. 1977), *affirmed*, 439 U.S. 322, 58 L.Ed. 2d 552, 99 S. Ct. 645 (1979) 16

Simler v. Conner, 372 U.S. 221, 9 L.Ed.2d 691, 83 S. Ct. 609 (1963) 12
Timsah v. General Motors Corp., 225 Kan. 305, 591 P.2d 154 (Kan. 1979) 18
Wideman v. Faivre, 100 Kan. 102, 163 P. 619 (Kan. 1917) 17

Constitutional Provisions

U.S. Constitution—Seventh Amendment 2, 12
U.S. Constitution—Fourteenth Amendment, §1 ..... 3, 10
Kansas Constitution—Art. 3, §3 ..... 2, 16
Kansas Constitution—Bill of Rights §5 ..... 2, 14
Kansas Constitution—Bill of Rights §18 ..... 3, 18

Statutes

28 U.S.C. 1247(3) 2
K.S.A. 60-238(a) 2, 14
K.S.A. 60-250 ..... 4, 17
K.S.A. 60-251(b) 3
K.S.A. 60-256 ..... 4, 17
K.S.A. 60-2101(b) 2, 16
K.S.A. 84-1-203 19
K.S.A. 84-1-205 19
K.S.A. 84-9-501 19
K.S.A. 84-9-507 19

Rules

Federal Rule 50 17
Federal Rule 56 17

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

SUBURBAN FORD, INC., DON HANSARD, LINDA HANSARD, BEN YOUNG, MARGARET YOUNG,
Petitioners,

vs.

FORD MOTOR CREDIT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

OPINIONS BELOW

The opinion of the Kansas Supreme Court 237 Kan. 195 (1985), is reproduced as Appendix A below. The unreported order of the Kansas Supreme Court dated June 28, 1985 is reproduced as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1247(3).

CONSTITUTIONAL & STATUTORY PROVISIONS

1. U.S. Constitution—Seventh Amendment:

   "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. Kansas Constitution—Bill of Rights §5:

   "Trial by jury. The right of trial by jury shall be inviolate."

3. Kansas Statutes Annotated (K.S.A.) 60-238(a):

   "SEC. 60-238. Jury Trial Of Right.

   (a) Right preserved.

   The right of trial by jury as declared by section 5 of the bill of rights in the Kansas constitution, and as given by a statute of the state shall be preserved to the parties inviolate."

4. Kansas Constitution—Art. 3, §3:

   "3. Jurisdiction and terms. The supreme court shall have original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus; and such appellate jurisdiction as may be provided by law. It shall hold one term each year at the seat of government and such other terms at such places as may be provided by law, and its jurisdiction shall be coextensive with the state."

5. K.S.A. 60-2101(b):

   "The Supreme Court shall have jurisdiction to correct, modify, vacate or reverse any act, order

or judgment of the District Court . . . in order to assure that any such act, order or judgment is just, legal, and free from abuse."

6. U.S. Constitution—Fourteenth Amendment, §1:

"Citizenship; privileges or immunities; due process clause. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

7. Kansas Constitution—Bill of Rights §18:

"Justice without delay. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

8. K.S.A. 60-251(b):

". . . (b) When waived.

No party may assign as error the giving or failure to give an instruction unless he or she objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he or she objects and the grounds of his or her objection unless the instruction is clearly erroneous. Opportunity shall be given to make the objections out of the hearing of the jury."

9. K.S.A. 60-250—Motion for Directed verdict:

> ". . . A motion for a directed verdict shall state the specific grounds therefor. . . ."

10. K.S.A. 60-256—Summary Judgment:

> ". . . (c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file . . . show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law . . . ."

STATEMENT OF THE CASE

Suburban Ford, Inc. (Suburban) did business as a Ford dealer in Derby, Kansas for approximately five years ending March 13, 1981. It financed its new vehicle inventory through Ford Motor Credit Company (FMCC) pursuant to an Automotive Wholesale Plan Application For Wholesale Financing and Security Agreement hereinafter called (Financing Agreement).

During the 5 year period of the Financing Agreement Suburban financed over 6,000 vehicles and borrowed and repaid $32,000,000.00. In addition it paid $750,000.00 in interest. (R., Vol. 26, Suburban's Exhibit 92; Vol. 74, p. 353). As of March 10, 1981, Suburban was not in default on any obligation to FMCC. As of March 11, 1981, Suburban was indebted to FMCC for principal advances of approximately $1,400,000.00 concerning approximately 220 vehicles. (R., Vol. 38, Suburban Exhibit 12C). As of the evening of March 11, 1981, Suburban had sold approximately 11 vehicles. (R., Vol. 31, Suburban Ex-

hibit 105). Pursuant to FMCC custom and practice, absent reasonable audit, Suburban had 4 days plus 1 mailing day within which to pay FMCC. (R., Vol. 67, pp. 137-138; Vol. 17, Suburban's Exhibit 15).

On March 11, 1981, FMCC commenced an audit (which Suburban at all times contended was unreasonable) during which it determined that the approximately 11 vehicles had been sold. The trial court found that FMCC could audit only at reasonable times and made the following clarifying statement on September 8, 1983 concerning the "Audit":

> (THE COURT) ". . . I'm finding that there was an agreement between the dealer and between Ford Motor Credit that upon demand on an audit day, the amount due and owing on floorplanned automobiles sold but not paid for was due. It's a jury issue . . .
>
> . . .
>
> I think there's a factual question here, and that's whether the audit was completed, and whether a demand was made. There's conflicting testimony, and the jury is going to have to be the arbitrator of that." (R., Vol. 84, p. 71, lines 21-25; p. 72, lines 5-9).

The trial court further found that Suburban was *not* in default concerning any unsold vehicle. (R., Vol. 4, pp. 535-587; Inst. 24). As of March 12, 1981, Suburban had approximately 209 vehicles financed under the Financing Agreement.

On March 12, 1981, FMCC stopped payment on two checks totaling $66,297.00 issued to Suburban concerning seven rental vehicles financed pursuant to the Financing Agreement. Also on that day FMCC instituted litigation

against Suburban[1] alleging that it had a Financing and Security Agreement concerning all new (220) and used (83) vehicles owned by Suburban. FMCC in that action procured an *ex parte* temporary restraining order without bond tying up funds derived from the sale of used vehicles at a local auto auction. (R., Vol. 60, p. 8). The TRO tied up 42 vehicles and $100,600.00. (R., Vol. 31, Suburban's Exhibit 105). The trial court on April 1, 1981 determined that FMCC had no interest in Suburban's used vehicles unless FMCC was on the title or the vehicles were trade-ins concerning the 11 sold new vehicles. (R., Vol. 1, pp. 108-111; Vol. 31). The trial court held that FMCC had no interest in 37 vehicles totaling $85,100.00. (R., Vol. 31, Suburban's Exhibit 105).

Suburban counterclaimed contending that on March 12, 1981 FMCC had breached the Financing Contract, converted 202 of Suburban's new vehicle inventory, maliciously prosecuted the *ex parte* temporary restraining order request and tortiously interfered with contracts of the Suburban principals. Suburban also alternatively plead numerous tort theories.

A jury heard eight weeks of testimony. The trial court recessed the trial for one week so that it could make legal rulings and prepare instructions. The jury was instructed and retired for deliberation for one week. No objections to instructions were made prior to the jury's commencement of deliberations. During the course of deliberation the jury propounded the following question:

---

1. Suburban contended that FMCC had also converted the seven rental vehicles and approximately 40 of Suburban's used vehicles which were not at the auto auction. This allegation concerning the seven rental vehicles was resolved in *Boulevard State Bank v. FMCC and Suburban Ford, Inc.*, Case No. 81c1249. A jury on December 7, 1984 found that FMCC converted Suburban's seven vehicles and awarded actual damages of $9,100.00. FMCC did not appeal that finding of the jury.

"THE COURT: This is a Hearing on September 21st, 1983, out of the presence of the jury. And the Hearing is in relation to a question that has been propounded to the Court by the jury, which they have formed during the time that they were in deliberations. This question was submitted to the Court at 12:44 p.m., and the question propounded by the jury was as follows:

"If a determination were to be made in favor of Suburban, is there any way of requiring payment of FMCC's damages we feel are Suburban's responsibility?"

Leo Huggins signed this document.

And the answer that I have given is as follows:

"Yes, you should place the amount of Ford Motor Credit Company's damages you feel are Suburban's responsibility in the verdict form finding in favor of Ford Motor Credit Company's claims against Suburban."

I have signed that document, Michael Corrigan." (R., Vol. 89, pp. 27-28).

On September 26, 1983, the jury returned a verdict in favor of Suburban for $61,300.00 actual damages and $1,750,000.00 punitive damages, in favor of the Suburban principals for $365,662.00, and in favor of FMCC for $214,000.00. Ford Motor Company was also awarded $194,000.00. Such award is not material to this Petition for Certiorari.

FMCC filed its Notice of Appeal and Suburban cross appealed. The Kansas Supreme Court, of its own volition, caused the case to be removed from the Court of Appeals and assigned directly to the Supreme Court.

The Kansas Supreme Court found:

> "The Trial Court, in its instructions, *essentially held* the acts of Ford Credit on March 11, 12 and 13, 1981 were authorized by the contract—*a position with which we agree.* However, the trial court then instructed the jury it could consider whether these same acts were actionable under various theories of tort liability. This was clearly erroneous." (Supreme Court opinion Appendix A, p. A1).

In the Kansas Supreme Court opinion the author quoted extensively from the Financing Agreement. She omitted from the opinion, however, paragraph 3 of the Financing Agreement:

> "3. Payments by dealer.
>
> "The aggregate amount outstanding from time to time of all *advances* made by Ford Credit to or on behalf of Dealer pursuant hereto shall constitute a single obligation of Dealer notwithstanding such advances are made from time to time, and such amount, or *so much* thereof *as may be demanded,* together with Ford Credit's interest and flat charges with respect thereto, *shall be payable by Dealer to Ford Credit UPON DEMAND. . . .*" (R., Contract/Security Agreement, ¶3, Vol. 9, FMCC, Exhibit 1).

The record is absolutely clear and undisputed that *NO DEMAND* was made concerning the 202 unsold vehicles that the jury found were converted. In fact FMCC never took a position claiming that Suburban had breached the Financing Agreement prior to March 12, 1981.

The Kansas Supreme Court reversed the verdict in favor of Suburban and the Suburban principals. It let stand the verdict in favor of FMCC.

Suburban, on May 17, 1985 filed a Motion for rehearing or modification in the Kansas Supreme Court contending:

1. That the Court's opinion was an invasion of Suburban's right to trial by jury and that the Court by its own standards could not consider the case *DE NOVO*. Suburban relied upon *Coleman v. MacLennon*, 78 Kan. 711, 744, 98 P. 281 (Kan. 1908).

2. That the Court's reliance upon the New Mexico case of *Isler v. Texas Oil & Gas Corporation*, 749 F.2d 22 (10th Cir. 1984) was misplaced because it was a non Uniform Commercial Code case and was clearly distinguishable from the facts of record. Suburban had relied heavily upon the Kansas case of *Klingbiel v. Commercial Credit Corporation*, 439 F.2d 1303 (10th Cir. 1976).

Suburban supplied the Court with a comparison of *Isler*, Suburban and *Klingbiel*. See Appendix C & D.

3. That the Court had failed to recognize that on numerous occasions it had held that the same act could constitute breach of contract and tort. Suburban relied upon *Malone v. University of Kansas Medical Center*, 220 Kan. 371, 552 P.2d 885 (Kan. 1976); *Cairo Cooperative Exchange v. First National Bank of Cunningham*, 228 Kan. 613, 620 P.2d 905 (Kan. 1980); *Jenner v. Kent Brown Chevrolet*, 227 Kan. 45, 605 P.2d 95 (Kan. 1980); *Moffet v. Kansas City Fire & Marine Insurance Company*, 173 Kan. 52, 244 P.2d 228 (Kan. 1952); *Yeager v. Dunnavan*, 26 WN2d 559, 174 P.2d 755, Restatement of Contracts, Vol. 1, §342, 84 ALR 345.

4. That the Court had apparently overlooked the fact that payment was only due upon demand and that no demand had been made.

5. That the Court had not viewed the record in light of the requirements of numerous provisions of the Uniform Commercial Code, namely: K.S.A. 84-9-501, K.S.A. 84-9-507, K.S.A. 84-1-102, K.S.A. 84-1-203, 84-1-205 and 84-1-208. See Appendix E.

6. That of the approximately 83 used vehicles owned by Suburban on March 12, 1981, only 6 were arguably part of the Financing Agreement.

7. That no obections were made by either FMCC or Suburban prior to the jury's retiring for deliberation and therefore K.S.A. 60-251(b) precludes the consideration of instructional error.

The Kansas Supreme Court denied Suburban's Motion without hearing on June 28, 1985.

REASONS FOR GRANTING WRIT

I.

THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES SHOULD BE APPLIED TO THE STATES IN ACTIONS INVOLVING CONTRACT AND/OR TORT.

The U.S. Supreme Court has not yet incorporated the Seventh Amendment into the Fourteenth Amendment in civil cases. The Court has since *Palko v. Connecticut*, 302 U.S. 319, 82 L.Ed. 288, 58 S. Ct. 149 (1937) applied numerous provisions of the Bill of Rights to the States through the 14th Amendment. The *Palko* Court and the Court in *Betts v. Brady*, 316 U.S. 455, 462, 86 L.Ed. 1595,

62 S. Ct. 1251 (1942), established the criteria for deciding each case of whether the denial was "shocking to the universal sense of justice."

The Court in *Duncan v. Louisiana,* 391 U.S. 145, 147-49, 20 L.Ed.2d 491 (88 S. Ct. 1444) (1968) overruled the *Palko* and *Betts* test saying:

> "The Fourteenth Amendment denies the states the power to deprive any person of life, liberty or property without due process of law. . . .
>
> The test for determining whether a right extended by the Fifth and Sixth Amendments is . . . whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . whether it is basic in our system of jurisprudence . . . and whether it is a fundamental right essential to a fair trial . . . ."

See also *Benton v. Maryland,* 395 U.S. 784, 23 L.Ed.2d 707, 89 S. Ct. 2056 (1969) where the Court in reviewing the *Duncan* test states:

> ". . . Once it is decided that a particular Bill of Rights guarantee is 'fundamental' to the American scheme of justice the same constitutional standards apply against both the State and the Federal Governments . . . ." At p. 795.

The Court in *Jacob v. City of New York,* 315 U.S. 752, 86 L.Ed. 1166, 62 S. Ct. 854 (1942), stated:

> "The right of jury trial in civil cases is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." At pp. 752-753.

See also *Simler v. Conner,* 372 U.S. 221, 222, 9 L.Ed.2d 691, 83 S. Ct. 609 (1963). In *Colgrove v. Buttins,* 413 U.S. 149, 157, 37 L.Ed.2d 522, 93 S. Ct. 2448 (1973), the Court stated that ". . . the purpose of the jury trial in . . . civil cases is to assure a fair and equitable resolution of factual issues."

The Court in *Fay v. People of State of New York,* 322 U.S. 261, 294 (1947) recognized in dicta that ". . . the function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ . . . . They must be organized to hear, try and determine . . . the evidence and law." In *Gallick v. Baltimore and Ohio Railroad Company,* 372 U.S. 108, 114-15, 9 L.Ed.2d 618, 83 S. Ct. 659 (1963), the Court held that the Ohio State Appellate Courts could not invade the function and province of a civil jury; and were not free to reweigh the evidence. While the *Gallick* Court failed to mention the Seventh Amendment, it applied Seventh Amendment principles.

The Court in *Pernell v. Southall Realty,* 416 U.S. 363, 40 L.Ed.2d 198, 94 S. Ct. 1723 (1974) held that the Seventh Amendment applied to a District of Columbia action involving recovery of possession of property. One of the rationales for such application was that actions for the recovery of real property were afforded jury trials at common law in 1791.

The Kansas Supreme Court in *Ford v. Guarantee Abstract & Title Co.,* 220 Kan. 244, 253-254, p. 21 (Kan. 1976), held that the Seventh Amendment applied to proceedings in Kansas.

> ". . . The authorities unanimously hold that a court, whether trial or appellate, is powerless to reduce the

verdict of the jury in an action for unliquidated damages and render judgment for a less amount, unless the party in whose favor the verdict was rendered consents to the reduction, since a reduction under such circumstances invades the province of the jury, and violates the *Seventh Amendment right to jury trial under the United States Constitution.* The proper course, if a remittitur is refused, is to set aside the verdict and grant a new trial. (Annot., 53 A.L.R. 779 [1928]; *Kennon v. Gilmer,* 131 U.S. 22, 33 L.Ed. 110, 9 S. Ct. 696; and Annot., 95 A.L.R. 1163 [1935]. . . .

. . . This is the law today. It was recently stated by the Sixth Circuit Court of Appeals in *Brewer v. Uniroyal, Inc.,* 498 F2d 973 (1974) that:

> '. . . [T]he District Court must offer the party awarded damages the choice of a new trial or the amount of the Court's remittitur. *Dimick v. Schiedt,* 293 U.S. 474, 476, 55 S. Ct. 296, 79 L.Ed. 603 (1935); *Kennon v. Gilmer,* 131 U.S. 22, 29, 9 S. Ct. 696, 33 L.Ed. 110 (1889); *Manning v. Altec, Inc.,* 488 F.2d 127 (6th Cir. 1973). The District Court cannot, without the consent of the parties, substitute its judgment for that of the jury on the issue of just compensation. *United States v. 93.970 Acres of Land,* 248 F.2d 17, 31 (7th Cir. 1958), *rev'd on other grounds,* 360 U.S. 328, 79 S. Ct. 1193, 3 L.Ed. 1275 (1959). *To permit the Court to do so would erode the parties' Seventh Amendment guarantee of a jury trial.*' (p. 976).

See also, *Burnett v. Coleman Company,* 507 F.2d 726-727 [6th Cir. 1974].)"

It cannot be reasonably disputed that pursuant to the current law of the vast majority of states, including Kansas, the right to trial by jury concerning cases at law involving contracts and/or torts is afforded.

II.

ONCE A STATE HAS ESTABLISHED THE RIGHT TO TRIAL BY JURY, THE FOURTEENTH AMENDMENT REQUIRES THAT IT BE AFFORDED.

Kansas in both the Bill of Rights to its Constitution (Article 5, adopted January 29, 1861) and Kansas Statutes Annotated 60-238 provide that the "right to trial by jury is inviolate."

The Kansas Supreme Court in *Hindman v. Shepard*, 205 Kan. 207, 468 P.2d 103 (1970), *cert. denied*, 401 U.S. 928 (1971) has clearly recognized that the state and federal right to jury trial is identical. At pages 215-216 the Kansas Court states:

> "A civil litigant's constitutional right to a trial by jury (Constitution of Kansas, Bill of Rights §5 and U.S. Constitution Amendment Seven) is predicated on whether the action at common law was one of law or equity. . . ."

The Kansas Court reaffirmed its adherence to the inviolate nature of trial by jury in *First National Bank of Olathe v. Clark*, 226 Kan. 619, 602 P.2d 1299 (Kan. 1979).

While the U.S. Supreme Court has not dealt directly with the issue, its opinion in *Fay, supra*, at page 294 supports the proposition that the adopted "trial process" must meet "standards of fundamental fairness." The Eighth, Ninth and Eleventh Circuits are in accord. In *Klimas v.*

Mabry, 599 F.2d 842 (8th Cir. 1979), *rev'd on other grounds*, 448 U.S. 444, 65 L.Ed.2d 897 (1980) the Eighth Circuit stated:

> "Where a state has provided, by statute, that a habitual criminal charge is to be tried to a jury, we do not believe that the state can abrogate that right in a particular case without violating the notions of fundamental fairness inherent in the due process clause. Where a right to trial by jury has been established under state law, the state cannot deny a particular accused that right without violating even the minimal standards of the due process clause. See *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961); *Berrier v. Engeler*, 583 F.2d 515, 522 (6th Cir. 1978); *Wolfs v. Britton*, 509 F.2d 304 (8th Cir. 1975); *Shirley v. State of N. C.*, supra; *Braley v. Gladden*, 403 F.2d 858, 860-861 (9th Cir. 1968). . ."

See also *Cox v. Hutto*, 619 F.2d 731, 734 (8th Cir. 1980). In *Peek v. Kemp*, 746 F.2d 672 (11th Cir. 1984) (rehearing *en banc*, 1985), the Eleventh Circuit stated at page 680,

> ". . . Although a state defendant's right to a unanimous jury is not a constitutional necessity, Georgia has preserved the right as a matter of state law, and may not arbitrarily deny that right to particular defendants.
>
> > Generally the failure of a state court to comply with the provisions of state law in its criminal trials is purely a matter of local concern and is not reviewable by federal courts under the due process clause of the federal constitution. The failure of a state to afford a particular defendant the benefit of established procedures under state law may, however, result in a denial of due process when the error made by the state court ren-

> ders the state proceedings so fundamentally unfair or so fundamentally deficient that they are inconsistent with the rudimentary demands of fair procedure.

Klimas v. Mabry, [*supra*]."

Once the right to jury trial is established, the strong federal policy favoring jury decision of disputed fact questions as stated in *Byrd v. Blue Ridge Rural Electric Co-Op, Inc.*, 356 U.S. 525, 538, 539, 2 L.Ed.2d 953, 78 S. Ct. 893, must be followed. See also *Atlantic & Gulf Stevedores v. Ellerman Lines Ltd.*, 369 U.S. 355, 7 L.Ed.2d 798, 82 S. Ct. 780 (1962) and *Shore v. Parklane Hosiery Company, Inc.*, 565 F.2d 815 (2nd Cir. 1977), *affirmed*, 439 U.S. 322, 58 L.Ed.2d 552, 99 S. Ct. 645 (1979).

III.

THE FOURTEENTH AMENDMENT REQUIRES THE KANSAS SUPREME COURT TO ACT WITHIN ITS JURISDICTION

With regard to the facts of this case, the Kansas Constitution, Article 3, §3 and Kansas Statutes Annotated 60-2101(b) grants the Kansas Supreme Court appellate jurisdiction. Appellate jurisdiction *does not allow* the Kansas Supreme Court to invade the province of the jury.

In *Coleman v. MacLennon*, 78 Kan. 711, 744, 98 P. 281 (Kan. 1908) the Court stated:

> ". . . Under the Constitution [Kansas] the appellate jurisdiction of this court is limited to the review of errors committed by the trial court from which the record comes. It can not consider cases *de novo* and decide them according to its own notions of the law

> and evidence. It can not take new evidence or pronounce any judgment except that the trial court did right or wrong in whole or in part. It can not direct what judgment the trial court shall enter unless the facts be found or agreed to. It does not have the constitutional power to do generally what ought to have been done by judge and jury at the trial, and so end the litigation, and the legislature can not, under the constitution, confer such power upon it. . . ."

See also *Wideman v. Faivre*, 100 Kan. 102, 163 P. 619 (Kan. 1917); *Hass v. Preferred Risk*, 214 Kan. 747, 522 P.2d 438 (Kan. 1974).

The limitations placed upon the scope of review has frequently been analyzed by the Kansas Supreme Court in conjunction with Kansas Statutes Annotated 60-250 (Directed Verdict) which is virtually identical to Federal Rule 50 and Kansas Statutes Annotated 60-256 (Summary Judgment) which is virtually identical to Federal Rule 56. In *Fisher v. Sears Roebuck & Co.*, 207 Kan. 493, 494-95, 485 P.2d 1309 (Kan. 1971), the Court stated:

> ". . . The Statute does not give a trial court free reign to substitute its judgment for that of jury. (*Gard v. Sherwood Construction Co.*, 194 Kan. 541, Syl. ¶8, 9, 400 P.2d 995; *Striplin v. Kansas Gas & Electric Co.*, 204 Kan. 324, 461 P.2d 825.) The standard to be used in measuring a defendant's motion for a directed verdict or for a judgment notwithstanding the verdict is the same. The question to be asked is whether there is any substantial evidence to sustain a verdict and judgment for plaintiff. Such motions should be sparingly and cautiously granted. (*Striplin v. Kansas Gas & Electric Co., supra; Swearngin v. Sears Roebuck & Company*, 376 F.2d 637 [1967].) . . ."

> "The propriety of granting or denying a motion for a directed verdict is tested by the same rule on appeal as in the trial court. The trial court is required to view the evidence and inferences therefrom most favorable to the party against whom the motion is made. The appellate court must do the same. (*Striplin v. Kansas Gas & Electric Co., supra;* see also *Springfield Tent & Awning Co. v. Rice,* 202 Kan. 234, Syl. ¶1, 447 P.2d 833). The credibility of witnesses is no concern of the court on a motion for directed verdict. (2B *Barron & Holtzoff,* Federal Practice and Procedure, §1075, p. 385.)"

See also *Apperson v. Security State Bank,* 215 Kan. 724, 732, 528 P.2d 1211 (Kan. 1974); *Knowles v. Klase,* 204 Kan. 299, 460 P.2d 944 (Kan. 1969); *Timsah v. General Motors Corp.,* 225 Kan. 305, 591 P.2d 154 (Kan. 1979); *Manley v. Wichita Business College,* 237 Kan. 427, ... P.2d ..... (Kan. 1985); *Carr v. Unit No. 8169,* 237 Kan. 660, 664-665, ... P.2d ..... (Kan. 1985).

The Kansas Bill of Rights, §18, provides that all persons, for injuries suffered in person, reputation or property, shall have a remedy by due course of law, and justice administered without delay. "Due course of law" was defined in *Hanson v. Krehbiel,* 68 Kan. 670, 75 P. 1041 (1904):

> Remedy by due course of law, as used in Section 18 of the Bill of Rights means the reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure and after a *fair hearing.*"

Article 18 was again recognized in *Ernest v. Faler,* 237 Kan. 125, 697 P.2d 870 (Kan. 1985), where the court found at p. 132 that:

> ". . . It is the primary duty of the courts to safeguard the declaration of right and remedy guaranteed by the constitutional provisions insuring a remedy for all injuries . . . . From these cases it is clear that the right of a person injured by the tortious act of another to a remedy for his injuries in one of the basic constitutional rights guaranteed protection by the Kansas Courts. . . ."

Petitioners respectfully submit that due process requires that contract rights likewise are included by inference.

The Kansas Supreme Court majority opinion, while lengthy, fails to analyze the record, omits the most critical section of the contract, fails to recognize that a significant portion of Suburban's property was outside of the Financing Agreement, and wholly ignores the entirety of the Uniform Commercial Code together with numerous well established principles to which it has consistently adhered. The opinion rests solely upon the Court's misplaced belief that the trial court has "essentially held" that FMCC's actions were authorized by the Contract. Nowhere does the record reflect such a ruling. Further, had the trial court so held it would have directed a verdict or granted a new trial. It did not do so. An examination of the applicable provisions of the Uniform Commercial Code Sections K.S.A. 84-9-501, K.S.A. 84-9-507, K.S.A. 84-1-203, K.S.A. 84-1-205 (Appendix E) will reveal that a question of fact most certainly is present in a case of this type.

The Kansas opinion relies upon its reading of the Financing Agreement together with the New Mexico case (*Isler v. Texas Oil & Gas Corp.*, 749 F.2d 22 (10th Cir. 1984)). No other cases are cited. In the Court's reproduction of the Financing Agreement it omitted (and presumably failed to consider) paragraph 3 which is set out above. Paragraph 3 requires that demand be made. In

fact, the record does not reflect that any demand was made. Further, FMCC did not contend that Suburban was in breach of the Financing Agreement until March 31, 1981. Assuming *arguendo* that Suburban was in breach on March 13, 1981, petitioners submit that whether or not the breach was material must always be a question in fact.

While petitioners recognize that this Court does not often engage in the business of considering a State Court's interpretation of state law, it is believed that an analysis of the Kansas Supreme Court's reliance upon *Isler, supra,* comparing the facts of record and the similarity of the facts of *Klingbiel v. Commercial, supra* will be helpful to demonstrate the fundamental lack of due process afforded to Suburban and the Suburban principals. (Appendix C & D).

Because Suburban was the prevailing party it must be presumed that the jury found that FMCC breached the Financing Agreement. Therefore, Kansas law requires that the evidence be reviewed in a light most favorable to Suburban and the Suburban principals. See *Reichuber v. Cook Well Servicing,* 220 Kan. 93, 551 P.2d 810 (Kan. 1976); accord, *Carr, supra.* Instructions 24, 31 and 32 (Appendix F) clearly place that issue before the jury. As noted in the dissent FMCC took possession of Suburban's property at a time when Suburban was not in default. If this is not conversion, it must be clearly a material breach of the Financing Agreement for FMCC to seize *all* of Suburban's new vehicle inventory.

It should be noted that neither party briefed the *Isler, supra* case or raised its issues during the underlying appeal. FMCC presented a copy of the opinion during oral argument and Suburban did not have a fair opportunity

to brief the issue. Accordingly, Suburban's only opportunity to brief the matter and challenge the invasion of Suburban's right to jury trial came in conjunction with its motion for rehearing. Such motion was summarily denied on June 28, 1985.

Petitioners respectfully submit that the opinion of the Kansas Supreme Court is an outrage. It is an affront to the jurors who patiently heard evidence and rendered their verdict after a one week deliberation. It is an affront to the Kansas Constitution, the U.S. Constitution and to the parties who sought resolution of their differences pursuant to the established judicial process.

CONCLUSION

For the above and foregoing reasons petitioners respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD A. MCCONWELL
(*Counsel of Record*)
CLAYTON E. DICKEY
LAW FIRM OF
EDWARD A. MCCONWELL
Cloverleaf 5 Bldg., Suite 210
6701 West 64th Street
Overland Park, Kansas 66202
(913) 262-0605
Attorneys for Petitioners

APPENDIX

APPENDIX A

No. 56,472

FORD MOTOR CREDIT COMPANY,
Appellant/Cross-Appellee,

v.

SUBURBAN FORD, *et al.*,
Appellees/Cross-Appellants.

SYLLABUS BY THE COURT

In an action by a secured party under an automobile floor plan financing agreement against a defaulting automobile dealership for an accounting and for a deficiency judgment against said dealership (and the agreement's guarantors) wherein said defendants assert numerous counterclaims predicated wholly upon tort theories, the record is examined and it is *held*: The trial court erred in instructing the jury on any tort-based counterclaims as the same are improper in this contract-based litigation, all as is more fully set forth in the opinion.

Appeal from Sedgwick district court, MICHAEL CORRIGAN, judge. Opinion filed May 10, 1985. Affirmed in part, reversed in part, and remanded with directions.

Gerrit H. Wormhoudt, of Fleeson, Gooing, Coulson & Kitch, of Wichita, argued the cause, and *Thomas D. Kitch* and *Rex G. Beasley*, of the same firm, were with him on the briefs for appellant/cross-appellee.

Edward A. McConwell of McConwell & Sullivan, of Overland Park, argued the cause, and *Thomas Francis*

Sullivan, of the same firm, was with him on the brief for appellees/cross-appellants.

The opinion of the court was delivered by

McFARLAND, J.: This complex action arises from the contractual relationships between an automobile dealership (Suburban Ford), its source of financing of inventory under a floor plan agreement (Ford Motor Credit Company), and its supplier of automobiles and parts (Ford Motor Company). The individuals named as parties to the action (Ben W. Young, Margaret C. Young, Don W. Hansard and Linda M. Hansard) are: (1) sued herein as guarantors of the contracts on behalf of Suburban Ford; and (2) seeking damages for themselves for claimed injury to Suburban Ford and for tortious interference with their contract which leased real estate to Suburban. The action between Ford Motor Credit and Suburban (Case No. 81-C-637) and the action between Ford Motor Company and Suburban (Case No. 81-C-1314) were consolidated for trial. The jury awarded the following: (1) in favor of Ford Motor Company—$194,000; (2) in favor of Ford Motor Credit Company—$214,000; (3) in favor of the individual defendants (against Ford Motor Credit)—$365,662; and (4) in favor of Suburban Ford (against Ford Motor Credit)—$61,300 in actual damages and $1,750,000 in punitive damages. Ford Motor Credit appeals from the judgments entered against it and certain rulings of the trial court. The defendants (Suburban Ford and the named individuals) cross-appeal from certain adverse rulings of the trial court limiting their claims. No issues from Ford Motor Company v. Suburban Ford, *et al.* (Case No. 81 C 1314) are before us on appeal. We are concerned wholly with Ford Motor Credit Company (FMCC) v. Suburban Ford, *et al.* (Case No. 81-C-637).

At this point in an opinion it is customary to summarize the facts and then proceed to discuss and determine, individually, the issues presented. Such a format is, however, wholly inappropriate to this litigation. What was commenced in 1981 as a comparatively straightforward action had, by the conclusion of its 1983 jury trial, mutated into an amorphous mass of truly Amazonian proportions. From the perspective of an appellate court, which by its very nature views a case only in its entirety, the litigation herein is Amazonian in more respects than sheer bulk. The course of this litigation may be likened to the nature of the great river itself—a series of slow-moving streams meandering through unmapped lands, repeatedly dividing, rejoining and then ending in a many-channeled delta.

The trial of the action herein lasted ten weeks and, understandably, a vast amount of material is contained in the record. To include a summary of all of the evidence introduced at trial is neither desirable nor necessary for determination of the issues. The keystone to the issues before us is the legal significance of certain actions taken by Ford Motor Credit Company (Ford Credit) on March 11-13, 1981. What occurred on those dates is essentially uncontroverted. Before recounting those events, it is, however, necessary to establish the relationship of the parties as it existed at the time.

On March 19, 1976, Suburban Ford made application for a wholesale line of credit (a "floor plan" arrangement) from Ford Credit. The document, although designated "application," is agreed by the parties to be the contract under which the rights and duties of Ford Credit and Suburban, pertinent hereto, are contained. The contract, as it may properly be called, must be set forth in this opinion in some detail.

"AUTOMOTIVE WHOLESALE PLAN
APPLICATION FOR WHOLESALE FINANCING
AND SECURITY AGREEMENT

Date March 19, 1976

To: Ford Motor Credit Company (hereinafter called "Ford Credit")

The undersigned Suburban Ford, Inc.
(Dealer's Exact Business Name)
(hereinafter called "Dealer") of 910 Nelson Dr.
(Street and Number)
Derby Kansas 67037
(City) (State) (Zip Code)

hereby requests Ford Credit to establish and maintain for Dealer a wholesale line of credit, and to make advances to or on behalf of Dealer thereunder, to finance new and used automobiles, trucks, truck-tractors, trailers, semi-trailers, buses, mobile homes, motor homes, other vehicles and other merchandise for Dealer under the terms of the Ford Credit Wholesale Plan as set forth in the January, 1973 edition of the Ford Credit Dealer Manual entitled 'Automotive Finance Plans for Ford Motor Company Dealers' or any subsequent edition thereof (hereinafter called the 'Plan'). In consideration thereof Dealer hereby agrees as follows:

"1. Advances by Ford Credit.

"Ford Credit at all times shall have the right in its sole discretion to determine the extent to which, the terms and conditions on which, and the period for which it will make advances to or on behalf of Dealer, or extend credit to Dealer, under the Plan or otherwise. Ford Credit, at any time and from time to time,

in its sole discretion, may establish, rescind or change limits or the extent to which financing accommodations under the Plan will be made available to Dealer.

. . . .

"4. Ford Credit's Security Interest

"As security for all advances now or hereafter made by Ford Credit to or on behalf of Dealer pursuant hereto, and for the observance and performance of all other obligations of Dealer to Ford Credit in connection with the wholesale financing of merchandise for Dealer, *Dealer hereby grants to Ford Credit a purchase money security interest in all such merchandise now owned or hereafter acquired by Dealer and a security interest in the proceeds, in whatever form, of any sale or other disposition thereof* and Dealer hereby assigns to Ford Credit and grants to Ford Credit a security interest in all amounts that may now or hereafter be payable to Dealer by the manufacturer, distributor or seller of any such merchandise by way of rebate or refund of all or any portion of the purchase price thereof.

"5. Dealer's Possession and Sale of Merchandise

"Dealer's possession of the merchandise financed hereunder shall be for the sole purpose of storing and exhibiting the same for sale or lease in the ordinary course of Dealer's business. Dealer shall keep such merchandise brand new and subject to inspection by Ford Credit and free from all taxes, liens and encumbrances, and any sum of money that may be paid by Ford Credit in release or discharge of any taxes, liens or encumbrances on any such merchandise or on any documents executed in connection

therewith shall be paid by Dealer to Ford Credit upon demand. Except as may be necessary to remove or transport the same from a freight depot to Dealer's place of business, Dealer shall not use or operate, or permit the use or operation of, any merchandise financed hereunder for demonstration or otherwise without the express prior written consent of Ford Credit in each case, and shall not in any event use such merchandise illegally, improperly or for hire. Dealer shall not mortgage, pledge or loan any of such merchandise, and shall not transfer or otherwise dispose of the same except by sale or lease in the ordinary course of Dealer's business. *Any and all proceeds of any sale, lease or other disposition of such merchandise by Dealer shall be received and held by Dealer in trust for Ford Credit and shall be fully, faithfully and promptly accounted for and remitted by Dealer to Ford Credit* to the extent of Dealer's obligation to Ford Credit with respect to such merchandise. As used in this paragraph 5, 'sale in the ordinary course of Dealer's business' shall include only (i) a bona fide retail sale to a purchaser for his own use at the fair market value of the merchandise sold, and (ii) an occasional sale of such merchandise to another dealer at a price not less than Dealer's cost of the merchandise sold, provided such sale is not a part of a plan or scheme to liquidate all or any portion of Dealer's business, and 'lease in the ordinary course of Dealer's business' shall include only a bona fide lease to a lessee for his own use at a fair rental value of the merchandise leased.

. . . .

"7. Credits

"All funds or other property belonging to Ford Credit and received by Dealer shall be received by Dealer in trust for Ford Credit and shall be remitted to Ford Credit forthwith. Ford Credit, at all times, shall have a right to offset and apply any and all credits, monies or properties of Dealer in Ford Credit's possession or control against any obligation of Dealer to Ford Credit.

"8. Information Concerning Dealer

"To induce Ford Credit to extend financing accommodations hereunder, Dealer has submitted information concerning its business organization and financial condition, and certifies that the same is complete, true and correct in all respects and that the financial information contained therein and any that may be furnished to Ford Credit from time to time hereafter does and shall fairly present the financial condition of Dealer in accordance with generally accepted accounting principles applied on a consistent basis. Dealer agrees to notify Ford Credit promptly of any material change in its business organization or financial condition or in any information relating thereto previously furnished to Ford Credit. Dealer acknowledges and intends that Ford Credit shall rely, and shall have the right to rely, on such information in extending and continuing to extend financing accommodations to Dealer. Dealer hereby authorizes Ford Credit from time to time and at all reasonable times to examine, appraise and verify the existence and condition of all merchandise, documents, commercial or other paper and other property in which Ford Credit has or has had any title, title retention, lien,

security or other interest, and all of Dealer's books and records in any way relating to its business.

"9. Default

"In the event Dealer shall fail to promptly pay any amount now or hereafter owing to Ford Credit as and when the same shall become due and payable or Dealer shall fail to duly observe or perform any other obligation secured hereby, or any representation made by Dealer to Ford Credit shall prove to have been false or misleading in any material respect as of the date on which the same was made, or a proceeding in bankruptcy, insolvency or receivership shall be instituted by or against Dealer or Dealer' property, *Ford Credit may take immediate possession of all property in which it has a security interest hereunder, without demand or other notice and without legal process.* For this purpose and in furtherance thereof, Dealer shall, if Ford Credit so requests, assemble such property and make it available to Ford Credit at a reasonably convenient place designated by Ford Credit, and Ford Credit shall have the right, and *Dealer hereby authorizes and empowers Ford Credit, its agents or representatives, to enter upon the premises wherever such property may be and remove same. In the event Ford Credit does acquire possession of such property or any portion thereof, as hereinbefore provided, Ford Credit may, in its sole discretion (i) sell the same, or any portion thereof, after five days' written notice at public or private sale for the account of Dealer, or (ii) declare this agreement, as wholesale transactions and Dealer's obligations in connection therewith to be terminated and cancelled and retain any sums of money that may have been paid by Dealer in connection therewith, or (iii) enforce any other remedy that Ford*

Credit may have under applicable law. Dealer agrees that the sale by Ford Credit of any new and unusued property repossessed by Ford Credit to the manufacturer, distributor or seller thereof, or to any person designated by such manufactuer, distributor or seller, at the invoice cost thereof to Dealer less any credits granted to Dealer with respect thereto and reasonable costs of transportation and reconditioning, shall be deemed to be a commercially reasonable means of disposing of the same. Dealer further agrees that if Ford Credit shall solicit bids from three or more other dealers in the type of property repossessed by Ford Credit hereunder, any sale by Ford Credit of such property in bulk or in parcels to the bidder submitting the highest cash bid therefor also shall be deemed to be a commercially reasonable means of disposing of the same. Notwithstanding the foregoing, it is expressly understood that such means of disposal shall not be exclusive, and that Ford Credit shall have the right to dispose of any property repossessed hereunder by any commercially reasonable means. Dealer agrees to pay reasonable attorneys' fees and legal expenses incurred by Ford Credit in connection with the repossession and sale of any such property. Ford Credit's remedies hereunder are cumulative and may be enforced successively or concurrently.

"10. General

"Dealer waives the benefit of all homestead and exemption laws and agrees that the acceptance by Ford Credit of any payment after it may have become due or the waiver by Ford Credit of any other default shall not be deemed to alter or affect Dealer's obligations or Ford Credit's right with respect to any subsequent payment or default.

"Neither this agreement, nor any other agreement between Dealer and Ford Credit, nor any funds payable by Ford Credit to Dealer, shall be assigned by Dealer without the express prior written consent of Ford Credit in each case.

. . . .

"11. Acceptance and Termination

"Dealer waives notice of Ford Credit's acceptance hereof, and this agreement shall be deemed accepted by Ford Credit at the time it shall first extend credit to Dealer under the Plan and shall be binding on Dealer and Ford Credit and their respective successors and assigns from the date thereof until terminated by receipt of written notice by either party from the other, provided, however, that any such termination shall not relieve either party from any obligation incurred prior to the effective date thereof." (Emphasis supplied.)

The application was executed on behalf of Suburban by its president, defendant Don W. Hansard, and its secretary, defendant Ben W. Young, who also were guarantors thereon.

Suburban Ford operated on premises which were leased to it by said officers and their wives. The dealership initially flourished and received a high rating from Ford Credit. This was followed by a deterioration in the relationship with the resultant lowering of ratings from "B" to "C" and then to "D" (the lowest possible rating). The rating changes were the result of Suburban's worsening financial condition and unsatisfactory audits, as well as the dealership having exceeded its credit limit. On several occasions from 1976 to 1981, Suburban was placed on "finance hold," which resulted in Suburban having

to obtain advance permission from Ford Credit before it would be allowed financing for additional cars. It also would not be issued the necessary document to transfer title to a purchaser (the Manufacturer's Statement of Origin) without first paying Ford Credit for the vehicle being sold. These restrictions were imposed on Suburban due to its weak financial condition and excessive inventory.

While on "finance hold" in 1980, Suburban obtained a Small Business Administration loan for $250,000 which it needed for additional working capital. Ford Credit then lifted its "finance hold," and fully reinstated Suburban's wholesale line of credit not to exceed $1,100,000. For several months prior to March 1981, Suburban was able to carry on business normally, selecting and ordering new cars and selling the same without first having to notify or pay Ford Credit.

We turn now to the critical events of March 11 and 12, 1981.

On March 11, 1981, Ford Credit conducted an on-site wholesale audit of Suburban's new vehicle inventory. The audit revealed that Suburban owed Ford Credit $90,240 for eleven vehicles which had been sold by Suburban and for which Ford Credit had not been paid. Art Hatch, the Ford Credit employee conducting the audit, made demand for payment from Suburban immediately after completing the audit on the afternoon of March 11, 1981. This demand for payment was refused by Suburban. Ford Credit attempted to contact Don Hansard, president of Suburban, who was the individual in charge thereof, but he had left the premises shortly after the audit had begun. By his own admission at trial, Hansard intentionally had avoided making any contact with Ford Credit between March 11 and March 16, 1981 (his first day back

on the job after leaving when the audit had been commenced). The inability to contact Hansard added to Ford Credit's growing concern. Mr. Hatch, while making the audit, observed unusual activity among Suburban's employees in that they did not remain at their desks. Rumors began circulating among the employees that Suburban was closing and going into bankruptcy. By the morning of March 12, 1981, such rumors had spread to customers of Suburban who called in to check on the dealership's status. After lunch on that day, Suburban mechanics gathered up their tools and personal effects and left the premises. As an employee (Hansard's son) testified, the dealership was "out of control" and in "complete chaos."

By noon, various officers of Ford Credit were conferring with each other concerning the difficulties at Suburban. One facet of their concern was the knowledge that Suburban was going to sell several used vehicles at an automobile auction that same day. Ford Credit, as will be recalled, had a security interest in all proceeds from the sale of new cars which included traded-in used cars or the proceeds from the sales thereof. Later that same afternoon (March 12), acting upon the advice of its legal counsel, Ford Credit filed this action seeking an accounting for the proceeds of both the new vehicles sold by Suburban for which Ford Credit had not been paid and the used vehicles in which Ford Credit had a security interest. At the same time, Ford Credit obtained a temporary restraining order which, while not preventing the sale of the used cars at the auction, did restrain the auction company from delivering the proceeds therefrom until March 17 when the hearing on the temporary injunction had been scheduled. The temporary restraining order was served on March 12. No bond was required for the temporary restraining order. Ultimately, it was deter-

mined that the proceeds from the auction should be divided $85,100 to Suburban and $15,500 to Ford Credit. There is no dispute over this division.

Suburban Ford did not open for business the following morning (March 13, 1981). After learning the dealership had failed to open, Ford Credit applied for and received a second temporary restraining order. This TRO was issued against Suburban Ford and restrained it from selling any of its new or used car inventory. The dealership had closed its doors prior to the issuance of this second TRO. The order was served later the same day.

Ford Credit took possession of the 202 new car inventory under its contractual right to repossess upon default. Of these vehicles, 150 were disposed of by "repurchase" and "rebills" which, in essence, shunts them to other components of the Ford network. No deficiencies resulted from these "in house" transactions. An additional 46 vehicles were sold by wholesale automobile auctions—each of these sales resulted in a deficiency. The parties do not state what happened to the other six vehicles but no challenge is asserted relative thereto.

Ford Credit claimed that under its contract it was entitled to $402,768.28 in damages from the defendant Suburban Ford. The trial court determined that the liability of the guarantors was the same as Suburban Ford and that issue was, accordingly, not submitted to the jury. The jury awarded Ford Credit $214,400.00.

Suburban Ford and the named individuals counterclaimed on a panorama of tort theories which may be characterized as: (1) melicious prosecution; (2) wrongfully securing restraining orders; (3) wrongful attachment; (4) abuse of civil process; (5) conversion; (6) gross negligence; (7) ordinary negligence; (8) prima facie tort;

(9) tortious interference with a contract; (10) tortious interference with employment; and (11) fraud. To complete this baker's dozen of theories, breach of contract and violation of the state antitrust laws are also asserted. The issues presented in the appeal and cross-appeal center on these counterclaim theories of liability. Ford Credit contends none of these theories should have been submitted to the jury; Suburban, and the named individuals, contend not enough of them were submitted. Ford Credit also complains that the instructions given relative to the claims against it were so confusing and conflicting as to require reversal. This latter point appears to be well taken, but first it is necessary to determine what, if any, of the counterclaim theories should have been submitted to the jury. The main thrust of the various tort theories is that, by virtue of its tortious acts, Ford Credit caused the collapse of Suburban Ford.

It should be emphasized that all parties to this action were in a *contractual* relationship with each other, and their difficulties with each other arise directly from that contractual relationship. *Isler v. Texas Oil & Gas Corp.*, 749 F.2d 22 (10th Cir. 1984), is a well-reasoned opinion pointing out the impropriety of confusing contract and tort law. *Isler* involved a dispute over rental payments between the corporate owner of an oil and gas lease and the individual to whom it had farmed out the lease. The trial court entered judgment for plaintiff Isler on a negligence theory. In reversing the trial court, the Tenth Circuit held as follows:

> "The very notion of contract is the consensual formation of relationships with bargained-for duties. An essential corollary of the concept of bargained-for duties is bargained-for liabilities for failure to perform them. Important to the vitality of contract is

the capacity voluntarily to define the consequences of the breach of a duty before assuming the duty.

"This case is illustrative. The effect of confusing the concept of contractual duties, which are voluntarily bargained for, with the concept of tort duties, which are largely imposed by law, would be to nullify a substantial part of what the parties expressly bargained for—limited liability. Unless such bargains are against public policy (covered either by prohibitory statutes or well-defined, judge-made rules such as unconscionability), there is no reason in fact or in law to undermine them. Indeed, it would be an unwarranted judicial intrusion into the marketplace. No reason appears to support such a radical shift from bargained-for duties and liabilities to the imposition of duties and liabilities that were expressly negated by the parties themselves when they decided to abandon their status as legal strangers and define their relationship by contract. Tort law proceeds from a long historical evolution of externally imposed duties and liabilities. Contract law proceeds from an even longer historical evolution of bargained-for duties and liabilities. The careless and unnecessary blanket confusion of tort and contract would undermine the carefully evolved utility of both.

"In tort, the legislatures and the courts have set the parameters of social policy and imposed them on individual members of society without their consent. The social policy in the field of contract has been left to the parties themselves to determine, with judicial and legislative intervention tolerated only in the most extreme cases. Where there has been intervention, it has been by the application of well estab-

lished contract doctrines, most of which focus on threats to the integrity of the bargaining process itself such as fraud or extreme imbalance in bargaining power.

"Further, it should not matter whether the breach of a bargained-for duty arises from inattention, a disagreement over the existence of the duty, a dispute over the nature of the duty, or a simple unwillingness to perform the duty. The parties by contract (or in the absence of an express provision, by implied rules evolved under contract analysis) have themselves defined the consequences of the breach. In the marketplace of contract, a breach is a breach is a breach—unless the parties choose to specify otherwise.

"[T]he facts alleged in plaintiff's tort claim are precisely the same as those alleged in their contract claim. Because the contract specifically defined the rights and duties of the parties regarding rental payments and notice, thereby precluding any extracontractual tort duty regarding such payments, we must reverse the judgment for plaintiffs sounding in tort. Accordingly, we need not reach defendant's other claims.

"In their briefs, plaintiffs suggest that the jury's verdict for them in tort and against them in contract was the result of confusion. On the record in this case, such a possibility is substantial. However, plaintiffs themselves invited such confusion by introducing negligence theories into what was a straightforward contract case." 749 F.2d at 23-24.

Ford Credit had the contractual right to make the March 11, 1981, audit which triggered the collapse of

Suburban Ford. The trial court's instructions provided, in part:

"INSTRUCTION NO. 22.

"Pursuant to the contract, Suburban was obligated to pay for sold vehicles, absent audit, no later than four days from the date of sale plus one day for mailing."

"INSTRUCTION NO. 23.

"Pursuant to the Automotive Wholesale Plan Application for Wholesale Financing and Security Agreement, Ford Motor Credit Company was allowed to perform audits of Suburban at reasonable times."

"INSTRUCTION NO. 21.

"Under the contract between the parties, Ford Motor Credit Company had the right to require Suburban Ford to pay Ford Motor Credit Company's auditor on the day of the audit for any motor vehicles sold by Suburban for which Ford Motor Credit Company had not yet been paid.

"Ford Motor Credit Company had the right to require Suburban's payment to be in certified funds.

"The Court has found that demand for payment was made on Suburban on March 11, 1981; that Suburban failed to pay; and that such failure was a default under the contract between the parties."

"INSTRUCTION NO. 24.

"On March 12, 1981, Suburban was not in default under the Automotive Wholesale Plan, Applications for Wholesale Financing and Security Agreement concern-

ing any unsold vehicle which had been financed under the agreement.

"The failure of Suburban to open for business on March 13, 1981, constituted a default under the Wholesale Plan."

It should be noted that Instruction No. 24 finding no default on March 12, 1981, relates solely to *unsold* vehicles. The "failure to pay" default of March 11, 1981, stated in Instruction No. 21, concerned *sold* vehicles.

"INSTRUCTION NO. 39.

"On April 1, 1981, this Court ruled that Ford Motor Credit Company was entitled to repossess all of Suburban Ford's new vehicle inventory financed by Ford Motor Credit Company under the Wholesale Plan."

These are correct statements of facts, are proper interpretations of Ford Credit's rights under the contract and are not challenged by any of the parties on appeal. The contract further provides that upon default Ford Credit had the right to take possession of the new car inventory it had financed even without legal process. Ford Credit resorted to legal process—but that can hardly be the basis of any tort liability.

The trial court, in its instructions, essentially held the acts of Ford Credit on March 11, 12 and 13, 1981, were authorized by the contract—a position with which we agree. However, the trial court then instructed the jury it could consider whether these same acts were actionable under various theories of tort liability. This was clearly erroneous.

Certainly the collapse of Suburban Ford caused financial loss to the individuals owning the corporation and

guaranteeing its debt. These same individuals had leased real estate to the dealership and financial loss to them personally resulted from the dealership's collapse. This is unfortunate, but it creates no liability in Ford Credit any more than do creditors filing routine collection actions against debtors incur liability if their lawsuits result in the debtors' losing their businesses and having to take bankruptcy, thus causing losses to their landlords and suppliers.

Nothing would be added to this already lengthy opinion by individually discussing each tort theory and specifically finding each improper. It is sufficient to state we have reviewed each such theory and find that the trial court erred in submitting *any* tort theory to the jury. It follows, of course, that the trial court did not err in refusing to submit certain tort theories to the jury (as claimed in the cross-appeal). The awards of actual and punitive damages against Ford Credit were wholly based upon tort theories of liability and are, accordingly, reversed *in toto*.

The contractual claims raised by defendant are defensive in nature. That is, by these claims defendants sought to reduce or eliminate the claim of Ford Credit against Suburban Ford (and the guarantors) through setoffs. The cross-appellants do not contend there was any trial court error relative to these defensive claims and the same are not issues before us, with the exception of the one such claim upon which Ford Credit predicates error. This issue relates to the propriety of the trial court's handling of the question of whether or not Ford Credit disposed of the collateral in a commercially reasonable manner. The court instructed:

"INSTRUCTION NO. 39.

"On April 1, 1981, this Court ruled that Ford Motor Credit Company was entitled to repossess all of Suburban Ford's new vehicle inventory financed by Ford Motor Credit Company under the Wholesale Plan. Ford Motor Credit Company was thereupon obligated to sell the vehicles in a commercially reasonable manner."

"INSTRUCTION NO. 40.

"In this case, the parties have agreed that the sale by Ford Motor Credit Company of any new and unused motor vehicles to Ford Motor Company at Suburban's invoice cost less any credits previously granted to Suburban and less reasonable costs of transportation and reconditioning shall be deemed to be a commercially reasonable means of disposal.

"The parties further agreed that if Ford Motor Credit Company solicits bids from three or more other dealers in the type of property repossessed by Ford Motor Credit Company, any sale by Ford Motor Credit Company of such property in bulk or in parcels to the bidder submitting the highest cash bid therefor also shall be deemed to be a commercially reasonable means of disposing of the same.

"Ford Motor Credit Company sold the repossessed vehicles in accordance with the above agreement."

"INSTRUCTION NO. 41.

"The provisions of the agreement of the parties as set forth in the preceding Instruction No. 40 are valid and binding unless they are manifestly unreasonable.

"The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the parties in their agreement is not of itself sufficient to establish that the agreement is manifestly unreasonable.

"Suburban Ford claims that these provisions of the agreement with Ford Motor Credit Company are manifestly unreasonable.

"Suburban has the burden to prove that the provisions of the agreement are manifestly unreasonable.

"If Suburban fails to prove that the provisions of the agreement are manifestly unreasonable, then you must find for Ford Motor Credit Company on that issue.

"If Suburban proves that the provisions of the agreement are manifestly unreasonable, then you should consider Instructions No. 42-6."

The trial court then, in instruction Nos. 42, 43, 44, 45 and 46 gave rambling, confusing and inconsistent instructions on the terms "manifestly unreasonable" and "commercial reasonableness."

Suburban appears to base its claim the sales were not made with "commercial reasonableness" on speculation that if it could have sold the vehicles at retail, the vehicles would have sold for more money. This contention lacks merit. The sales were made, as found by the trial court, in accordance with the contract terms. A secured creditor is not required to leave its security with the defaulting financially distressed debtor for the debtor to sell. Such a requirement could easily transform a secured creditor into an unsecured creditor. We conclude it was error for the trial court to submit the issue

of "manifest unreasonableness" to the jury. As found by the trial court the sales were within the contractual provisions for sale of repossessed inventory and no legitimate basis appears from the record which would justify instructing the jury that it could, in effect, ignore the contractual provisions relative thereto.

The difficulty with this point is that the winner thereof (Ford Credit) has no place to go with its victory. The disposition of the collateral question came up as one of several claimed setoffs. The claim of Ford Credit was for $402,768.28. The jury awarded Ford Credit $214,400. The posture of the appeal is such that we do not know whether the $402,768.28 was controverted or not or whether specific amounts were claimed for particular setoffs. We do not know if the jury allowed anything in this claimed setoff. Under such circumstances this court cannot modify the award to Ford Credit as we are not shown what, if any, part of the difference between the claim and jury award may be attributable to the improper setoff being submitted to the jury.

The judgment entered in favor of Ford Credit is affirmed. All judgments against Ford Credit are reversed and the case is remanded with directions to enter judgment in favor of Ford Credit on all claims of defendants herein.

PRAGER, J., concurs in the result.

LOCKETT, J., concurring and dissenting: I would dissent from the part of the majority decision which finds that the trial court erred when it instructed the jury to consider whether certain acts were actionable under various theories of tort liability. Based on all the facts presented to the jury, it is possible that the jury could have found that Suburban had a cause of action for malicious prosecution against Ford Credit.

We have stated in *Nelson v. Miller,* 227 Kan. 271, 276, 607 P.2d 438 (1980), that the elements of a civil action for malicious prosecution are:

> "(a) That the defendant initiated, continued, or procured civil procedures against the plaintiff.
>
> (b) That the defendant in so doing acted without probable cause.
>
> (c) That the defendant acted with malice, that is he acted primarily for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based.
>
> (d) That the proceeding terminated in favor of the plaintiff.
>
> (e) That the plaintiff sustained damages."

The following facts, which the majority did not include in its decision, could establish an action for malicious prosecution.

On March 11, 1981, Suburban contacted its attorney who arranged for $500,000 in financing from a local bank and informed Ford Credit that arrangements were being made for payment, that funds were available up to $500,000, and that all negotiations should be conducted through him as Suburban's attorney.

During the afternoon of March 11, 1981, Ford Credit took possession of approximately 200 models of Suburban's new car inventory and four retail contracts totaling $27,198.64.

On March 12, 1981, Ford Credit took possession of all of Suburban's new vehicle inventory and posted its employees to secure the new vehicle inventory. On the same day, Ford Credit also notified the other Ford dealers in

the Wichita area to acquire any stock available from Suburban's parts department.

The result of all these actions by Ford Credit was that Suburban could not open for business on March 13. Ford Credit had control of all of Suburban's new inventory and its parts. Due to the first restraining order, Suburban did not have access to the proceeds of the sale of its used inventory. Suburban could not carry on business when all of its cars, parts, and funds were under Ford Credit's control.

Suburban established that Ford Credit had initiated civil procedures against it even though there was not probable cause to do such. Suburban could not have sold the new cars or any parts since they were in Ford Credit's possession as of March 12. While Ford Credit had a contract claim against Suburban, the second restraining order was not necessary for proper adjudication of that claim. The evidence, which shows that Suburban had funds available to make payment on its contract with Ford Credit, would indicate that Ford Credit was more interested in shutting Suburban down than allowing it to continue business. Because of Ford Credit's actions, Suburban suffered damages. The jury considered this evidence and found for Suburban. The trial court was correct in allowing an action and damages for malicious prosecution.

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 84-56472-AS

Ford Motor Credit Company,
Appellant,

v.

Suburban Ford, et al.,
Appellees.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellees for Rehearing.

DENIED.

Date June 28, 1985

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

APPENDIX C

Isler	*Suburban*
1. Non UCC case involving leasehold interests	UCC case involving goods (vehicles)
2. Obligation to make lease payments arise solely from written contract	Obligations arise both from the written contract and at law; further causes of action arises from acts outside written contract concerning used vehicles
3. No duty imposed by law	Duties imposed by law, i.e., UCC, conversion, malicious prosecution
4. Jury found no breach of agreement	Jury found FMCC breached agreement
5. Texas Oil's acts were that of *omission*	FMCC's acts were that of *commission*

Isler v. Texas Oil and Gas Corporation, 749 F.2d 22 (10th Cir. 1984).

APPENDIX D

Klingbiel	*Suburban*
1. Written security agreement for one vehicle	Written security agreement floor plan - 202 vehicles
2. Article 9 of UCC applies	Article 9 of UCC applies
3. Written agreement required demand	Written agreement required demand
4. Vehicle taken without demand (1)	Vehicles taken without demand (202)
5. Debtor not in default concerning vehicle	Debtor not in default concerning 202 vehicles
6. Jury found secured party to have converted vehicle	Jury found secured party to have converted 202 vehicles and draft
7. Jury awarded punitive damage for conversion	Jury awarded punitive damage for conversion
8. Trial court held conversion proper cause of action and punitive damage proper relying heavily on the UCC Articles 9 and 4	Trial court held conversion proper cause of action and punitive damage proper relying heavily on UCC Article 9 and legislative comment
9. 10th Circuit fully and completely affirmed the trial court's application of the UCC and Kansas law	Kansas Supreme Court disregards the UCC and the rulings of the trial court

---

Klingbiel v. Commercial Credit Corporation, 439 F.2d 1303 (1976).

APPENDIX E

KANSAS STATUTES ANNOTATED

84-9-501. Default. . .

(1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part . . .

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below *may not be waived,* or varied . . .

(e) Subsection (1) of Section 84-0-507 which deals with the secured parties' liabilities for failure to comply with this part.

84-9-507. Secured Party's Liability for Failure to Comply with this Part.

(1) . . . the debtor has a right to recover from the secured party any loss caused by a failure to comply with the provision of this part. . .

84-1-102

"1. This act shall be liberally construed and applied to promote its underlying purposes and policies.

2. Underlying purposes and policies of this act are:

(a.) to simplify, clarify, and modernize the law governing commercial transactions;

(b.) to permit the *continued expansion of commercial* practices through *custom, usage and agreement of the parties;*

(c.) to make uniform the law among the various jurisdictions.

3. The effect of provisions of this act may be varied by agreement, except as otherwise provided in this act

and *except that the obligations of good faith, diligence, reasonableness and care prescribed* by this act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

84-1-203

"Every contract or duty within this act imposes an obligation of *good faith* in its performance or enforcement."

84-1-205

"1. A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

4. The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade."

84-1-208

"A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral 'at will' or 'when he deems himself insecure' or in words of similar import shall be construed to mean that he shall have *power to do so only if he in good faith* believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised."

APPENDIX F

Jury Instructions

Instruction No. 24:

On March 12, 1981, Suburban was not in default under the Automotive Wholesale Plan, Applications for Wholesale Financing and Security Agreement concerning any unsold vehicle which had been financed under the agreement.

The failure of Suburban to open for business on March 13, 1981, constituted a default under the Wholesale Plan.

Instruction No. 31:

As between parties to a contract, Suburban and Ford Motor Credit Company, prevention of performance by Ford Motor Credit Company would constitute a breach. Where one party to a contract prevents complete performance of the contract by the other party, such other party is excused from the remainder of its duties under the contract.

In order to find in favor of Suburban on the issue of prevention of performance, you must first find that Ford Motor Credit Company engaged in malicious prosecution as defined in the preceding instructions.

Whether Ford Motor Credit Company prevented Suburban from performing fully all of its obligations under the contract is a question of fact for you to determine from the evidence. Suburban has the burden of proof on this issue.

If you find that the Credit Company prevented performance by Suburban then you should reduce the amount of damages, if any, awarded to the Credit Company by

such damages, if any, as Suburban may have suffered as a direct result of such prevention.

Instruction No. 32:

Conversion is an unauthorized assumption and exercise of the right of ownership over personal property belonging to another to the exclusion of the owners rights.

The intention required is simply an intent to use or dispose of the goods, and the knowledge or ignorance of the actor as to their ownership has no influence in deciding the question of conversion.

Suburban's burden of proof is sustained once it shows such gross neglect of duty by Ford Motor Credit Company as to evidence of reckless indifference of the rights of others.

R. Vol. 4, pps. 535-587.